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Supreme Court
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In The

Supreme Court of the United States

DAVID CALLISON,

Petitioner,

v.

CITY OF PHILADELPHIA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Samuel A. Dion, Esq.
Counsel for Petitioner
Dion & Goldberger
1616 Walnut Street, Ste. 2316
Philadelphia, PA 19103
(215)546-6033

INTRODUCTORY STATEMENT

The lower court in this matter allowed the respondent/ employer to enforce a policy that required the petitioner/ employee to stay at home while he was on approved FMLA leave, despite the fact that there was no logical reason to restrict him to stay at home. In doing so, the lower court granted the respondent, and all future public and private employers, the right to control employees while they are on lawful FMLA leave despite the fact that they have met all the requirements of the FMLA itself.

QUESTIONS PRESENTED

1. Did the lower court err in finding that the respondent's sick leave policy, which was enforced upon the petitioner while he was at home and on approved FMLA leave, did not interfere with his substantive FMLA rights?

3. Did the lower court err in finding that the petitioner had to adhere to respondent's sick leave policy requirements while he was on FMLA leave despite the fact that he had already been approved for FMLA leave and met the requirements of the FMLA itself?

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OPINION BELOW

The Third Circuit of Appeals Jurisdiction selected this matter for publication in the Federal Reporter. The decision, which was deemed "precedential" by the Third Circuit, and is reported at 128 Fed. Appx. 897 (3d Cir. 2005).

JURISDICTION

The Third Circuit filed its decision on April 5, 2005, and entered an order affirming entry of summary judgment in favor of respondent, which was granted by the lower court on May 8, 2004. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Section 105 of the FMLA and 29 C.F.R. 825.220

The FMLA makes it unlawful for an employer, such as Appellee to "interfere with, restrain, or deny" an employee's right to take 12 weeks of FMLA leave. Section 105(a)(1) of the FMLA; and 29 CFR 825.220(a)(2). The FMLA further states that: "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. 29 CFR 825.220(b). Moreover, ". . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Section 102(a)(1)(d) of the FMLA.

STATEMENT OF THE CASE

The petitioner, David Callison, first became employed with the respondent, City of Philadelphia, on February 2, 1998 as a Heavy Duty Vehicle Maintenance Technician with the Office Fleet Management.

In about January 2000, Mr. Callison was diagnosed with deep anxiety reaction and stress, due to stress at both work and home, by his physician, Dr. Jay Moore. As a result, he took intermittent sick leave during that year amounting to no more than 26 days throughout the year 2000.

On January 24, 2001, Mr. Callison went on approved FMLA leave. Prior to January 24, 2001, Mr. Callison was not notified that he had any disciplinary problems with the exception of being placed on a sick abuse list in October 2000. In fact, in 1998, he was commended for having perfect attendance.

Around January 2001, Mr. Callison's union representative told him that "perhaps given . . . how sick he was and that he was on medication maybe he shouldn't be [at work]." It was at that time that Mr. Callison requested FMLA leave. The City's agents were aware that Mr. Callison was sick at that time.

Between January 24, 2001 and April 17, 2001, Mr. Callison was out on approved FMLA leave for anxiety reaction.

The City has a Sick Leave Policy which reads as follows: "During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return. An employee is to remain at home except for personal needs related to the reason for being on sick leave. While on sick leave an employee may be called or visited by a sick leave

investigator unless the employee has 150 days or more of accumulated sick leave credit."

Based upon The City's Penalties provision regarding the said Sick Leave Policy, if a given employee were to violate the Sick Leave Policy more than once, he or she would be subjected to discipline including suspension and termination.

On the very day that he commenced his FMLA leave, January 24, 2001, The City purports to have issued an Employee Warning Record to Mr. Callison, which would have been his first recorded violation of the said Sick Leave Policy, although Mr. Callison was not at work to receive, and did not receive, this memorandum. The said Employee Warning Record purports that Mr. Callison was not at home on January 8, 2001, while he was out sick, and he thus violated the Sick Leave Policy, because he failed to notify the Sick Control Hotline that he was leaving his residence on that date.

The City's agent called Mr. Callison at home on January 29, 2001 and February 7, 2001 for no good reason other than to enforce its Sick Leave Policy.

On May 4, 2001, after Mr. Callison was back from FMLA leave, he first received 2 Notices of Suspension for a total of 4 days for allegedly leaving his residence for a second and third time on January 29, 2001 and February 7, 2001 without notifying the Sick Control Hotline, while he was on approved FMLA leave. The recommendations for these suspensions were dated February 1 and 9, 2001, which was during Mr. Callison's approved FMLA leave. On May 8, 15, 16 and 17, 2001, Mr. Callison served his suspensions without pay.

Mr. Callison filed a complaint alleging violations of the FMLA in the Eastern District of Pennsylvania on May 8, 2003. The City filed a motion for summary judgment on January 20, 2004 of all counts. Appellant filed a motion for partial summary judgment on February 17, 2004. Appellant's motion

for partial summary judgment was limited to the issues presented in this petition.

On May 5, 2004, the Honorable Legrome D. Davis denied Mr. Callison's motion for partial summary judgment and granted summary judgment in favor of the City on all issues. Mr. Callison filed a motion for reconsideration pursuant to FRCP Rule 59(e) on April 7, 2004. After an oral argument on May 24, 2004, on June 17, 2004, the Honorable Legrome D. Davis denied Mr. Callison's motion for reconsideration.

Mr. Callison filed the Notice of Appeal to the Third Circuit Court of Appeals in this matter on July 8, 2004 restricted to the same issues presented in this petition. The Third Circuit affirmed Judge Davis' ruling on April 5, 2005.

REASONS FOR GRANTING THE PETITION

I. THIS HONORABLE COURT SHOULD ENSURE THAT THE PRECEDENT SET BY THE THIRD CIRCUIT IS APPROPRIATE, BECAUSE IT PERMITS EMPLOYERS-- BOTH PRIVATE AND PUBLIC-- TO CONTROL THE WHEREABOUTS OF EMPLOYEES WHO ARE OUT ON APPROVED FMLA LEAVE.

The precedent set by the Third Circuit will result in widespread national consequences. Now employers, both private and public, have the justification to implement policies to control employees while they are out on FMLA leave. The employees who must adhere to these policies can be disciplined for violations of the policies even though they are at home on approved FMLA leave-- and not at the workplace.

Since Section 105(a)(1) of the FMLA and 29 CFR 825.220(a)(2) make it unlawful for an employers, such as the City to "interfere with, restrain, or deny" an employee's right to take 12 weeks of FMLA leave, this Interference claims, as they are called, are based on the prescriptive sections of the FMLA which create substantive rights for eligible employees. The basic substantive right granted to all employees under the FMLA is the right to take FMLA leave.

The FMLA further states that: "'Interfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 CFR 825.220(b).

The Third Circuit concluded that since Mr. Callison was allowed to take his FMLA leave and return to work after his leave, the enforcement of the City's Sick Leave Policy did not interfere with Mr. Callison's substantive rights. However, the Third Circuit failed to address whether or not the City's actions of suspending Mr. Callison would served to discourage Mr. Callison and other employees of the City from taking FMLA leave in the future.

An employer can discourage employees from taking FMLA in much less extreme ways than an absolute refusal to allow a worker to return from FMLA leave. In the matter at bar, the City's act of enforcing its Sick Leave Policy on the Mr. Callison while he was on approved FMLA leave, did nothing more than to harass the Mr. Callison while he was on leave and thus discourage him and other employees from taking FMLA because of the fear of suspension without pay or termination for unfair reasons.

The court below concluded that the City's Sick Leave policy ensures that employees do not abuse their FMLA rights. However, the FMLA has its own anti-abuse provisions. See 29 U.S.C. Section 2613(a); and Pendarvis v. Xerox Corp., 3 F.Supp.2d 53. 56 (D.D.C. 1998) in which the court stated

Section 2613 "is designed as a check against employee abuse of leave." Moreover, the enforcement of the City's Sick Leave Policy is based upon the false presumption that an employee has abused his/her FMLA leave if he/she is not home. In fact, nothing can be further from the truth. In the matter at bar, there was no logical reason to demand that Mr. Callison stay inside his home at all times while on FMLA leave. He was not purporting to be physically unable to do anything. He was purporting to have emotional problems which necessitated a rest period from the stresses of his work environment.

Once an employee is pre-approved for FMLA leave, he/she should be left alone. The FMLA allows an employer to obtain a second opinion from a health care provider of its choosing, and updated certifications on a reasonable basis. 29 U.S.C. Section 2613(d)(1) and (e). The City failed to follow the procedures of the FMLA designed to ensure Mr. Callison was not abusing his FMLA rights and instead suspended Mr. Callison for an irrelevant reason-- because he was not at home when The City called him.

It is the position of Mr. Callison that even though he was permitted to return from his pre-approved leave, his FMLA rights were still interfered with, because he was issued 2 suspensions (totaling 4 days without pay) for no good reason which will serve to discourage him and other employees from taking FMLA leave.

Lastly, the opportunity for abuse is much too great. The City can suspend and terminate its employees, including Mr. Callison, by over-scrutinizing their adherence or lack of adherence to the policy without fear of violating the FMLA itself. Even if the City were to mistakenly believe that Mr. Callison violated the sick leave policy, their actions would be justified, because they did not violate the FMLA.

Although Mr. Callison was not terminated, the City's Sick Leave Policy would have allowed The City to terminate

Mr. Callison's employment if he was purported to have violated the Sick Leave Policy a total of 5 times. In such an instance, Mr. Callison would not have returned from FMLA leave. Therefore, it defies logical reasoning to conclude that the suspensions issued to Mr. Callison did not interfere with his right to FMLA leave, given that termination would have interfered with his leave.

Mr. Callison was not returned to the same pay that he had prior to his FMLA leave, because he was suspended without pay for 4 days. In the absence of the suspensions, Mr. Callison would not have lost 4 additional days of pay. The FMLA guarantees that any person taking FMLA leave be restored with the same pay after returning from FMLA leave. See Section 104(a)(1)(B) of the FMLA.

II. THE CITY'S POLICY IMPROPERLY INVOKES ADDITIONAL REQUIREMENTS UPON EMPLOYEES WHO TAKE FMLA LEAVE

To be entitled to take FMLA leave, employees are not required to stay at home or report to their employer when they have to leave home.

In the case of Mr. Callison in the matter at bar, the requirements for his "entitlement" to leave is as follows: ". . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Section 102(a)(1)(d) of the FMLA.

The City requires the following of all employees on FMLA leave: "During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return . . . [and] An employee is to remain at home except for

personal needs related to the reason for being on sick leave." However, such requirements are too restrictive of persons on FMLA leave, because the FMLA deems the employee eligible for FMLA based upon Section 102(a)(1)(d). It follows that once Mr. Callison qualified for his FMLA leave pursuant to the guidelines of the FMLA, he did not have to fulfill any additional requirements. No provision in the FMLA permits the City to enforce any other requirements upon FMLA candidates beyond those set forth by the FMLA itself.

CONCLUSION

This Honorable Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully Submitted

SAMUEL A. DION, ESQ.
Counsel of Record for Petitioner
Dion & Goldberger
1616 Walnut Street
Suite 2316
Philadelphia, PA 19103